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ing and the case reviewed by the Court of Appeals. Some of the principal differences are that the tariffs have been clarified, that a public terminal is now maintained on the Army Base, whereas in the prior case the Army occupied the entire facility, and that the record shows adequate railroad facilities at Norfolk apart from the Army Base. The Court of Appeals in the earlier case was particularly influenced by its understanding that no other facilities adequate for Army shipments were maintained by the railroads during the prior period. Whatever defects there may have been in the original record of the earlier case in this respect were remedied on rehearing before the Commission after remand by the Court of Appeals. The record in the present case of course is free of any such inadequacy.

The Court below held that in this case the Commission had conformed to the legal principles stated by the Court of Appeals, and it concluded that the opinion of the Court of Appeals "does not impel reversal of the Commission's order in this case".

V. CONCLUSION.

This Court has said that it "is not the place to review a conflict of evidence". *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 410. *A fortiori*, there is even less need of argument in this Court when there is no substantial conflict in the evidence, and when the decision depends upon the determination of factual issues. The only disputed point was whether the railroad agent continued to operate the Army portion of the Base as a public Wharfinger, as required by the tariff relied upon, and the Commission determined this point in

STATUTES CITED

IN THE

Supreme Court of the United States

October Term, 1955

No. 491

UNITED STATES OF AMERICA, *Appellant*,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA.

On Appeal From the United States District Court for the District of Columbia

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MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the revised rules of this Court, the Appellees* move that the judgment of the District Court be affirmed on the ground that the questions raised by Appellant are so insubstantial as not to warrant further argument.

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* The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Virginian Railway Company, Southern Railway Company, Norfolk & Western Railway Company.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of a statutory three-judge District Court entered June 28, 1955, pursuant to 49 U.S.C. § 17(9) and 28 U.S.C. § 2321-25, dismissing a petition to set aside an order of the Interstate Commerce Commission in the *United States* v. *Aberdeen & R. R. Co.*, 289 I.C.C. 49. The opinion of the District Court is reported at 132 F. Supp. 34.

By Complaint filed with the Commission the United States alleged that since May 1, 1951, the railroads have refused to pay the Army for wharfage and handling services in connection with export freight shipments moving across the Army's piers at Norfolk, Virginia. The Commission found that there is no tariff obligation to make such payments to the Army, that there is no difference in the treatment accorded Army shipments from that accorded other shipments under similar circumstances, and that the refusal to make the payments demanded is not unreasonable or discriminatory. The Commission dismissed the Complaint. 289 I.C.C. 49.

The principal findings and conclusions of the Commission which the Statutory Court approved and which this Court is asked by Appellant to reject are summarized briefly with reference to some, but not necessarily all, of the evidence in the Appendix hereto.

Upon review, the District Court held that the Commission's order "is supported by adequate findings; that these findings in turn, are supported by substantial evidence in the record, particularly the testimony of Plaintiff's own witnesses; that the record amply supports the finding that Plaintiff has not

been accorded different treatment from any other shipper under the same or similar circumstances and has not been subjected to any unlawful discrimination; that the findings form a rational basis for the Commission's ultimate conclusion that failure and refusal of the Defendants to absorb wharfage and handling costs on the Complainant's traffic moving over its piers in Norfolk on and since May 1, 1951, had not been shown to have subjected or to subject the Complainant to the payment of rates and charges which were or are unjust, unreasonable or otherwise unlawful". Accordingly, the District Court sustained the order, *United States* v. *Interstate Commerce Commission,* 132 F. Supp. 34. One judge dissented.

ARGUMENT

The decision of the District Court does not present any question of substance warranting further argument in this Court. The order of the Commission was based on an appraisal of the facts involved in the particular situation presented. The District Court, upon review of the record, has found that the findings of the Commission are adequately supported by substantion evidence, particularly by Appellant's own evidence upon which the Commission largely relied. The court below correctly applied familiar principles of law which this Court has often declared control review of orders of the Interstate Commerce Commission. The Jurisdictional Statement does not suggest any conflict with decisions of this Court, and the case does not raise any important or substantial questions of law.

The proper standard of review of administrative orders in the lower courts was set forth in *Universal*

Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474, where this Court concluded, at page 490:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

The opinion of the statutory court in the instant case shows that it neither misapprehended nor misapplied the proper standard of review. This Court, to all practical purposes, is now asked to re-examine the record and to review the evidence and to determine issues of fact in order to determine whether the statutory court was correct.

I. The Tariff Question Presents a Factual Issue.

Ordinarily the unloading of freight and, with respect to export freight, the providing of piers are obligations of the shipper, not of the railroads, and the railroads assume these burdens only to the limited extent provided in their tariffs. When the railroads assume the burden they do so only at railroad piers or at public terminals, never at private piers belonging to the shipper. The Commission has so found in many cases*, as it did in this case, 289 I.C.C. 57-8, 61. This difference

* Interchange of Freight at Boston Piers, 253 I.C.C. 703; Norfolk Port Commission v. Chesapeake & O. Ry. Co., 159 I.C.C. 169; Patterson v. Aberdeen & R. R. Co., 266 I.C.C. 45; United States v. New York Central R. Co., 272 U.S. 457; Weyerhaeuser Timber Co. v. Pennsylvania R. Co., 229 I.C.C. 463; Wharfage Charges at Atlantic and Gulf Ports, 157 I.C.C. 663, 174 I.C.C. 263.

in treatment is not unlawful so long as all shippers are treated alike. *Barringer & Co.* v. *United States*, 319 U.S. 1, 13.

At Norfolk the railroads provide certain railroad piers where export freight can be delivered to steamships and under certain conditions they unload the freight from the cars. The railroads do not provide piers or unloading services generally, but assume these obligations only within the limits specified in their tariffs. Furthermore, such obligations, where they are assumed at all, are not undertaken in the line-haul tariffs which fix the freight rates, and such tariffs give no indication, specifically or by implication, that wharfage and handling services will be accorded. The line-haul carriers which do not reach the port have no part in these services and are not parties to the tariffs which assume the obligation. On the contrary, the only reference to the services is found in the terminal tariffs of the local port carriers which assume the obligation to provide the services, subject to limitations, without additional compensation. Thus the applicable freight rates are not affected one way or the other by the existence or nonexistence of these services, and the services where offered in the terminal tariffs of the local port carriers are "free" in the sense that they have no effect upon the freight rates.

In addition to performing the services on their own piers, the local port carriers in Norfolk provide in their terminal tariffs for a similar arrangement at the so-called Army Base, a large marine terminal owned by the United States, but, prior to May 1, 1951, leased to Stevenson & Young, Inc., a public wharfinger, which operated the facility as a public pier. By agreement with the Norfolk port carriers, Stevenson &

Young, Inc. acted as agent for the port carriers in providing an additional railroad facility at the Army Base and unloading the freight that the Norfolk port carriers assumed an obligation in their terminal tariffs to unload. The railroads compensated Stevenson & Young as their agent in the performance of such services in accordance with the amount of railroad freight that was entitled to the free services under the tariff. The payments made to the railroad agent, not being refunds to a shipper, were not allowances within the meaning of the Interstate Commerce Act, were not required to be published in tariffs, and were not subject to Interstate Commerce Commission regulation.

While Stevenson & Young operated the Army Base as a public pier, military shipments handled by Stevenson & Young as agent for the railroads were treated like any other shipments and were accorded the free wharfage and handling service by the railroads if they qualified under the tariffs. On May 1, 1951, however, the United States terminated the Stevenson & Young lease and took over the Army Base for military operation. Part of the facility was turned over to the Navy which thereafter handled its own freight and whose shipments are not involved in this controversy and have never been made the subject of claims such as the Army has advanced herein. Another part of the terminal was turned back to Stevenson & Young for continuation of its business as a public wharfinger. The same railroad arrangements as those previously in effect were maintained as to freight thus handled by Stevenson & Young as public wharfingers, and all shippers, including the United States, were entitled to the same free services as previously. The balance of the Army Base, however, was taken over and operated

by the Army for its exclusive use and shipments consigned to the Army were directed to be delivered to this facility into the possession of the Army which thereupon took control of these shipments from the railroads and handled them as it saw fit. The issue in this case is whether the Army is entitled to the same compensation for providing its own wharf and unloading its own freight as was paid to Stevenson & Young under contract as agents for the railroads for the unloading of railroad freight at a public pier. The Commission decided that it was not.

The terminal tariff provision upon which Complainant relied, quoted at 289 I.C.C. 58, stated that the railroad would absorb the cost of wharfage and handling services on freight delivered to vessels "over wharf properties owned or leased by Norfolk Terminals Division of Stevenson & Young, Inc., and operated by Norfolk Terminal Division of Stevenson & Young, Inc., as a public terminal facility of the rail carriers", and when "Stevenson & Young, Inc., acting in the capacity of a public wharfinger, furnishes wharfage facilities and performs handling services for account of and as agent for the rail carriers on traffic that is neither consigned to or from nor owned or controlled by Stevenson & Young, Inc." After the Army terminated the lease and took over a part of the pier for its exclusive use, Army shipments moving over that part of the pier ceased to be entitled to the free services provided for in the tariff (1) because the shipments did not move over wharf properties "owned or leased by Norfolk Terminals Division of Stevenson & Young, Inc.", (2) because the shipments did not move over wharf properties that were "operated by Norfolk Terminals Division of Stevenson & Young, Inc. as a

public terminal facility of the rail carriers" and (3) because as to those shipments Stevenson & Young, Inc. did not act "in the capacity of a public wharfinger" or furnish wharfage facilities or perform handling services "for account of and as agent for the rail carriers". The Army could of course have continued to receive the free services like other shippers had it seen fit to allow its shipments to be handled through the public facility. It did not do so, however, and the Complaint deals with shipments that were delivered to the Army and were handled by the Army in that portion of the facility retained for exclusive Army use and maintained and operated under exclusive Army control.

The theory of the case was that because the Army also employed Stevenson & Young, Inc., to unload its shipments, the Army portion of the terminal continued its character as a Stevenson & Young facility, subject to the aforesaid tariff provision.* The Commission found that this argument was not in accord with the facts, that the Army shipments were not handled by Stevenson & Young, Inc. as a public wharfinger and agent for the railroads, and that the shipments were handled over wharf properties which are under the exclusive control of the Army and with respect to which Stevenson & Young, Inc., was only a labor contractor. The findings of the Commission were in accordance with the testimony of Complainant's own witnesses, and it seems clear that the tariff issue is resolved as a question of fact rather than law.

* The Army discontinued the services of Stevenson & Young, Inc., on January 1, 1953, but has given no explanation as to how this affects its theory of the case.

II. The Commission Found Absence of Discrimination in Fact.

The Commission found that, with respect to the services involved, Army shipments were treated exactly like other shipments, and that no other shipper would have been entitled to compensation for providing his own wharf and unloading his own freight. The Commission found that the tariffs contain no provision for the payment of allowances, and therefore the only question was whether the railroads should have performed the services. The services are available for military shipments, like all other shipments, at railroad and public terminals, including the public terminal on the Army Base. Per contra, the services are not available on shipments which pass into the possession of the shipper on their own terminals. Accordingly the Commission held that no discrimination had been shown under Sections 2 and 3 of the Act.*

The determination of factual conditions justifying differences in service is a matter peculiarly within the province of the Commission. In *Barringer & Co.* v. *United States*, 319 U.S. 1, 6, which dealt with the loading of cars under certain conditions and the refusal of the railroads to load under other conditions, this Court said that the weighing of circumstances and conditions "is a question of fact for the Commission's determination". In *United States* v. *Wabash R. Co.*, 321 U.S. 403, 411, this Court said:

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* The Commission held that the Army was actually preferred in the matter of freight rates, since no other shipper taking possession of his freight at the port would have been entitled to the export rates. By special tariff provision the export rates are made applicable to shipments consigned to Army Bases. Under Complainant's theory that the Army Base retained its character as a public terminal, the Army shipments would not have qualified as export traffic.

> "Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful. * * * In any case findings of discrimination or undue preference under Secs. 2 and 3(1), as we have said, are for the Commission and not the courts."

In order to bolster its argument, Appellant contends that it is entitled to preferential treatment under Section 6(8) of the Interstate Commerce Act:

> "That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

Reliance upon this provision is too insubstantial to deserve detailed argument. The words of Section 6(8) make it clear that the section applies to the physical movement of traffic and has nothing to do with the lawfulness of charges or the payment of allowances. There was no evidence of any failure of the railroads "to facilitate and expedite the military traffic". It is also to be noted that the Appellant has not suggested that the period since May 1, 1951, has been a "time of war or threatened war," nor has it shown any demand of the President.

III. The Commission Found as a Factual Matter That the Railroad Obligation Was Terminated.

The Commission found that, pursuant to the direction of the Army the shipments involved were delivered to the Army Base on tracks designated by the Army itself and thereafter disposed of by the Army, thus terminating the transportation obligation. 289 I.C.C. 65. The Commission further found that placement of the cars on Army Base tracks short of the piers as directed by the Army constituted final delivery, cutting off any further obligation that the railroads might otherwise have under their terminal tariffs or the line-haul rates. This finding disposes of the case, regardless of the other issues. That is to say, the Commission concluded that, even assuming some obligation on the part of the railroads, the obligation was cut off by the Army's voluntary choice to take delivery of its shipments short of the piers.

When the Commission makes a finding of this character it decides a question of fact and its conclusion must be upheld if supported by evidence. Similar conclusions of the Commission have been upheld consistently by this Court. *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402; *United States* v. *Pan American Corp.*, 304 U.S. 156; *United States* v. *Wabash R. Co.*, 321 U.S. 403; *United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186. In the *Wabash* case, at page 408, the Court said:

> "In sustaining the Commission's findings in these proceedings, as in related case, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that

the negative. 289 I.C.C. 59-60. Appellant's own witness testified: "On Army traffic my Company is a labor contractor instead of a terminal operator". (Tr. 221)

In other respects also the findings of the Commission are consistent with Appellant's evidence. For example, Appellant's own witnesses admitted that the railroads do not pay wharfage allowances to shippers who provide their own piers (Tr. 377-8), that the railroads unload export freight only on public piers (Tr. 377-8), that under similar circumstances other shippers would not be entitled to the services or payments demanded by the Army (Tr. 229, 236, 383), that the services and payments demanded are not covered by the export rate tariffs (Tr. 378, 380, 384), and that the Army shipments received the benefit of the export rates only because they were handled over an Army Base, as distinguished from a public terminal (Tr. 382-3). This testimony would appear to dispose of all the issues raised by Appellant before the Commission except the question whether the Army shipments met the requirements of the terminal tariff. In its Jurisdictional Statement Appellant seems virtually to have abandoned its reliance on the tariff. In any event that question is primarily one of fact.

The contentions advanced in Appellant's Jurisdictional Statement raise transportation questions relating to port services which the Commission in the exercise of its informed judgment has considered and decided in many prior cases. In the instant case it correctly and consistently applied to the facts it found the principles that the Commission has established in these prior decisions. In *M'Cormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I.C.C. 727 (1933), the Com-

mission held not only that export freight passing into the possession of the shipper was not entitled to the port services but that it would be unlawful to accord the services. The case was followed in *Ruckert Terminals Corp.* v. *Baltimore & Ohio R. Co.*, 286 I.C.C. 485 (1952). In a case dealing with the Army Base at Norfolk, the Commission held long ago that the wharfage and handling services were not included in the export rates. *Norfolk Port Commission* v. *Chesapeake & Ohio Ry. Co.*, 159 I.C.C. 169 (1929). The Commission has held that neither the Government nor other shippers are entitled to wharfage allowances for supplying their own piers. *Patterson* v. *Aberdeen & Rockfish R. Co.*, 266 I.C.C. 45 (1946); *Interchange of Freight at Boston Piers*, 253 I.C.C. 703 (1942). In *Borough of Edgewater, N. J.* v. *Arcade & Attica R. Corp.*, 280 I.C.C. 121, 125 (1951), the Commission said:

> "A distinction, however, in the application of the rates to industrial piers which the railroads do make is that, while at railroad or other public piers they unload or load the cars, or absorb the cost thereof, in no event do they perform such service, or absorb its cost, on traffic of industrial pier owners, delivered, or received, at such piers. *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I.C.C. 463, 472-473. It will be understood that, in their application to industrial piers, our findings observe and embody such distinction."

The Commisison has consistently held throughout its history that the distinction described in this quotation does not give rise to unreasonableness or discrimination. Appellant is now asking this Court to reject principles which the Commission has adopted and approved over a long period of time and to substitute

the judgment of the Court for that of the Commission on the transportation questions that are involved.

For the foregoing reasons, it is clear that this appeal presents no new or substantial questions. It is therefore urged that the judgment of the District Court should be affirmed.

Respectfully submitted,

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November 21, 1955.

APPENDIX

Findings and Conclusions of the Commission

1. It is not the legal duty of the railroads to provide wharfage service, i.e., piers where export freight may be unloaded, but they do provide ample wharf facilities at Norfolk for all export traffic, including Army shipments, if the Army desires to use the public piers. 289 I.C.C. 61, 63. The adequacy of such facilities was proved by the railroads (Tr. 542, 546, 549) and not disputed by Appellant. Appellant admitted that the railroads have no duty to provide piers. (Tr. 396, 412)

2. To the extent the railroads provide wharfage they do so by furnishing the piers, and in no event pay allowances to shippers who prefer to use their own facilities. 289 I.C.C. 61. This finding is not only supported by railroad testimony but was admitted by Appellant. (Tr. 377-8) Since allowances must be published in tariffs, this is a matter within the knowledge of the Commission.

3. To the extent the railroads undertake to provide wharfage, they have the right to supply the facility and cannot be required to pay allowances to shippers who prefer to use their own facilities, i.e., to hire the shippers' piers. 289 I.C.C. 65.

4. Since the Army, by taking control of the part of the Base over which its traffic moved, prevented wharfage service by railroads, any obligation was terminated that might otherwise have existed. 289 I.C.C. 64. Appellant contended that Stevenson & Young, the railroad agent, was still in charge of the Army Base and thus entitled to the contractual payments for supplying wharfage, despite the testimony of Appellant's witness, Colonel Weed, (Tr. 39-40) and the documentary evidence to the contrary. Appellant's operating witness testified "On Army traffic my Company is a labor contractor instead of a terminal operator" (Tr. 221) and "I do not see how it could have

been done otherwise". (Tr. 247) He explained that the customary service of a public terminal operator would not have satisfied Army requirements.

5. It is not ordinarily the duty of a railroad to unload freight (handling) but the railroads at Norfolk unload certain freight subject to definite tariff limitations. Two of these tariff limitations are significant in this case: (1) That the railroads actually perform the services and do not pay allowances to shippers for doing so; and (2) that they do so only on public piers and not on piers controlled by the shippers. 289 I.C.C. 58. This finding is supported by the testimony of the various railroads (Tr. 323, 325, 358-61, 372, 462, 473, 498, 530) and admitted by Appellant's witnesses. (Tr. 377-8)

6. Beginning May 1, 1951, in lieu of using public piers where railroad handling was available, the Army took over the major portion of the Army Base, took possession of its own freight, subjected some of it to processing and other treatment, destroyed its identity as export freight, and otherwise exercised complete dominion over its own shipments. 289 I.C.C. 56, 57, 60. Appellant's own witness supplied the supporting testimony. (Tr. 229, 230, 245-8)

7. Under similar circumstances, no other shipper would be entitled to the free loading privilege or even to the export rates accorded the Army. 289 I.C.C. 61, 63. This was admitted by Appellant's witnesses. (Tr. 229, 236, 378, 383)

8. Accordingly, the Army was treated exactly like any other shipper with respect to the wharfage and handling services, and was not discriminated against. 289 I.C.C. 61.

9. The railroads were not obligated to meet the special Army requirements for handling freight, customary railroad handling service would not have been acceptable to the Army, and by reason of its special requirements, the Army prevented the railroads from performing the serv-

ice. 289 I.C.C. 64. Appellant's evidence shows that the railroads would have had to operate subject to Army control and direction. (Tr. 67, 72, 148-9) that the usual type of terminal operation could not be permitted, (Tr. 20) that Army control was necessary (Tr. 247) and that the difference in the special service required was such as to increase the cost from 75 cents per ton to $2.87. (Tr. 248, 284-5)

10. The terminal tariffs, which are the sole sources of any wharfage or handling obligation, neither authorize nor require the payment of allowances on the Army shipments involved, 289 I.C.C. 60-61, 64, and thus no violation of Section 6(7) was proved. Appellant's tariff expert admitted that the alleged obligation depended on the terminal tariffs. (Tr. 378, 380, 384)

11. The line-haul rates are not unreasonable when the wharfage and handling services are not accorded. 289 I.C.C. 63-6. Appellant's witness admitted that the rates are made without consideration of the wharfage and handling services (Tr. 385, 389) and that the line-haul carriers, which publish the export rates, have no participation in the port services. (Tr. 378) The public terminal operator admitted that he performed the services only for the terminal lines (Tr. 235) The record shows that the line-haul rates could not possibly contain any element of cost or charge for the port services and are the same whether or not free wharfage and handling services are supplied. (Tr. 325-9, 356, 371, 503, 531)

12. Appellant, instead of being treated unfairly, had been given advantages which would have been unlawful in the case of any other shipper, to wit: (1) The Army received the export rates by special concession, whereas other shippers under similar circumstances would have been obligated to pay the higher domestic rates; and (2) the Army was given extra switching services for which any other shipper would have been obligated to pay tariff charge. 289 I.C.C. 55, 63. Appellant's transportation wit-

ness admitted that the export rates would not be applicable except for the special tariff provision in favor of Army and Navy Bases. (Tr. 382-3)

13. In addition to the foregoing matters, the Army's method of requiring and accepting delivery short of unloading point terminated any further obligation of the railroads, and the railroads were thus relieved of any obligation they might otherwise have. 289 I.C.C. 65. This finding disposes of the case regardless of the other issues. It is supported by the discussion at pages 55-7 of the report, which was based largely on Appellant's own evidence. (Tr. 181-3, 187-8, 190-212, 221)